84-503

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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1984

BETTY ADAMS, et al.,

Plaintiff-Petitioner,

-v.-

UNION CARBIDE CORPORATION,

Defendant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR CERTIORARI

Milton Dunn, Esq.
23300 Chagrin Boulevard
Suite 106
Beachwood, Ohio 44122
(216) 464-8310

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

Pursuant to Federal R.Civ.P. 56, may the "reasonableness" of a manufacturer's course of conduct under Restatement (2nd) of Torts, Sec. 388 be decided as a matter of law?

PARTIES

Plaintiff-Petitioners:

Betty Adams
Joseph Adams

Defendant-Respondent

Union Carbide Corporation

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DECISIONS OF THE COURTS BELOW

Memorandum and Opinion of the United States District Court (N.D. Ohio), May 10, 1983, Granting Defendant's Motion for Summary Judgment.

Opinion and Mandate of the United States Court of Appeals (6th Circuit), July 2, 1984, Affirming the Judgment of the District Court.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit, entered July 2, 1984. No petition for rehearing of that decision was filed. Review is sought in this Court pursuant to the provisions of 28 U.S.C. Sec. 1254(1).

RELEVANT PROVISIONS

The decision of the court below involves an interpretation of Federal R.Civ.P. 56. The pertinent text of the Rule is set forth in the Appendix.

STATEMENT OF THE CASE

This case arises out of a complaint filed by Plaintiff-Petitioner Betty Adams (hereafter "Adams") on June 20, 1980, in the United States District Court for the Northern District of Ohio. The complaint alleged that Adams had incurred severe respiratory problems as a result of her exposure to toluene diisocyanate ("TDI"), a product manufactured by Defendant-Respondent Union Carbide Corporation ("Union Carbide"). Adams had been exposed to TDI in the course of her employment with General Motors Corporation ("GM"). The complaint alleged negligence on the part of Union Carbide in failing to warn either Adams of the adverse effects of exposure to TDI. Jurisdiction of the Federal Court was predicated upon

diversity of citizenship.

TDI is a liquid chemical which has been widely used by the automobile industry in the manufacture of seat cushions and other car parts; it has been used since 1969 by GM in the plant where Adams worked. The TDI is pumped from delivery trucks into storage tanks at the GM plant; from there, it is mixed with other chemicals to produce a polyurethane foam, which is injected into seat cushion molds. After the cushion is formed, the mold is opened and the cushion is removed by hand. Prior to removal, there is no direct contact between employees and TDI in its liquid form.

The chief danger of TDI, however, lies in exposure to its fumes, which act as a severe respiratory irritant. Persons exposed to TDI vapors may develop

what is known as "TDI asthma," a condition characterized by shortness of breath, coughing, and other asthma-like symptoms. In certain circumstances, inhalation of TDI fumes can lead to death. For these reasons, the Occupational Health and Safety Administration and its predecessor, the American Conference of Government Industrial Hygienists, have prescribed maximum levels of exposure to TDI since the mid-1960's.

Adams began her employment with GM in 1967, working in the department which manufactured car seats, dashboards, and arm rests. She continued working in that department subsequent to the introduction of TDI in the plant in 1969. Her medical records clearly indicate that her problems with TDI developed almost contemporaneously with its introduction. As

early as 1969, her doctor advised GM that she was experiencing difficulties because of "fumes at work." GM's doctor removed her from the department in 1971, but returned her there three weeks later when her symptoms ceased. Even after Adams' personal physician had recommended that she not be assigned to work in areas in which she would be exposed to fumes, GM's doctor encouraged her to remain in the department on a "trial" basis. Adams was not permanently restricted from the department until a year later, by which time her respiratory problems had increased to the extent that she was frequently caused to miss work for extended periods of times due to what was then diagnosed as "flu" or "bronchitis."

Adams, of course, had never been informed of the use of TDI in the plant,

let alone the dangers of that use. Not until 1978 was it determined that her problems resulted from exposure to TDI; at that time, she was certified as permanently disabled as a result of TDI asthma.

After the filing of the complaint, the answer, and various discovery requests, Union Carbide moved the district court for summary judgment, claiming that it had warned GM about the dangers of TDI, and had thus discharged any duty it had to warn Adams. On March 10, 1983, the trial court granted the motion. The case was subsequently appealed to the Court of Appeals for the Sixth Circuit. On July 2, 1984, that Court affirmed the lower court's ruling in a split decision.

ARGUMENT

In order to be entitled to summary judgment, the moving party must demonstrate the complete absence of a genuine dispute as to any material fact.

> "The function of a motion for summary judgment is not to permit the court to decide issues of fact, but solely to determine whether there is an issue of fact to be tried." Aetna Ins. Co. v. Cooper Wells & Co., 234 F.2d 342 (6th Cir. 1956).

The trial court, in making this determination, must construe the evidence in the record most favorably to the non-moving party. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). Moreover, not only the facts, but the inferences to be drawn from those facts, must give rise to no genuine issue before the court may render summary judgment.

> "Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences to be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment." American Fidelity & Casualty Co. v. London & Edinburgh Ins. Co., 354 F.2d 214, 216 (4th Cir. 1965).

The stringency of these tests have rendered negligence cases particularly difficult of disposition on summary judgment, since such cases usually involve not only facts, but inferences to be drawn from those facts. Resolution of whether a particular course of conduct was "reasonable" under all the circumstances is a determination that the courts have been extremely reluctant to wrest from the jury.

> "Even when the facts underlying the issue of negligence are undisputed, the issue must still be submitted to

> the jury if reasonable men could reach different conclusions and inferences from those facts. . . . [I]t would be a mistake to conclude that summary judgment is never appropriate in a negligence action, but the circumstances in which it is proper are rare." Croley v. Matson Navigation Co., 434 F.2d 73, 75 (5th Cir. 1970).

The thrust of Union Carbide's claim to entitlement to summary judgment is its contention that it had adequately informed GM of the dangers of TDI, and could reasonably rely upon GM to communicate these warnings to its employees, including Adams. In support of its contention, Union Carbide submitted, as part of its motion, numerous documents which it had provided GM regarding the dangers of TDI. It was not disputed by Union Carbide that this information was not provided directly to Adams or to any other employee of GM, nor was it disputed

that GM had not communicated these warnings to its employees.

The first question which must be resolved in determining the appropriateness of summary judgment in this case is whether the material provided by Union Carbide to GM was informationally adequate; i.e., whether that material was sufficient to adequately and fully inform GM of the various dangers in the use of TDI. A review of that material discloses that, while substantial space was devoted to procedures for unloading the chemical, cleaning out the storage tanks, and the like, information regarding the specific disability suffered by Adams, development of TDI asthma, is sketchy. The existence of the malady is acknowledged; however, there is a paucity of advice as to the recognition of the disease, as well as to

the prior detection of those individuals who may be most susceptible to the disease. GM's mismanagement of Adams' problems serve to underscore these inadequacies; despite Adams' persistent problems, GM either did not recognize the problem because of the vague nature of the information provided by Union Carbide, or callously allowed Adams to continue working in an area which created grave hazards to her health. While the latter alternative may indeed be the correct one, that conclusion is hardly an appropriate basis for determining a motion for summary judgment.

Adams' contention as to the informational inadequacy of Union Carbide's warnings to GM are futher buttressed by subsequent communications between the two corporations. While Union Carbide de-

scribes its information program as an "ongoing" one, one might well conclude that the ongoing nature of the program was compelled by the inadequacy of the information originally provided. The only other material submitted by Union Carbide in support of its motion, other than the information originally given GM in 1969, is an exchange of letters between Union Carbide and GM in 1975. Those letters reveal that, six years after Union Carbide's first shipments of TDI to GM, GM found it necessary to make the following inquiries: "Do sensitized individuals recover 100% pulmonary function after removal from exposure to TDI? What medical screening should be done prior to exposure to TDI?" If GM concluded, at that late date, that the information already supplied did not

provide the answers to those questions, it is difficult to fathom how Adams, who received no information at all, could have been adequately apprised of the dangers.

Moreover, this analysis does not fully state the issue. The question at this juncture is not whether the information was adequate, but rather who is supposed to make that determination. While, as the trial court noted, it is possible to decide the question of adequacy of warnings by summary judgment, the better rule is that "[t]he adequacy of a warning under products liability is a question to be left to the jury." Bryant v. Technical Research Co., 654 F.2d 1337, 1345 (9th Cir. 1981).

Even assuming that the information provided by Union Carbide to GM was

adequate to inform GM of the full extent of the dangers of TDI, the question remains whether Union Carbide satisfied its duty to warn Adams merely by warning GM. The courts and the parties are in agreement that this question must be resolved according to the dictates of Restatement (2nd) of Torts, Sec. 388, which provides as follows:

> "One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable

> care to inform them of its dangerous condition or of the facts which make it likely to be dangerous."

The Court of Appeals found, as a matter of law, that Union Carbide's duty to warn was discharged by the information supplied to GM, based upon Comment n of the Restatement Section. Closer reading of the Comment, which is set forth in full in the dissenting opinion in the court below (See Appendix, Dissenting Opinion at 13-16), reveals, however, that no precise answer to the question is given. Rather, the Comment simply suggests the issue be resolved through application of a balancing test, taking into account numerous factors, such as the magnitude of the danger, the likelihood of the information being communicated to the ultimate user, the feasibility of such further communication, and

the like.

The resolution of this balancing test poses two problems. First, as the dissenting opinion makes clear, Union Carbide's right to rely upon GM to communicate the warnings to Adams is not nearly so clear-cut as the majority indicates. Indeed, other than a generalized belief that GM would advise Adams, Union Carbide took no steps whatsoever to ensure that Adams, or any other employee, was in fact advised by GM of the dangers of TDI. In essence, all that the evidence submitted by Union Carbide demonstrates is that in 1969, Union Carbide sent a packet of information on TDI to GM, and that, six years later, it answered several questions that GM raised regarding the use of TDI. To adopt, as a matter of law, the position that, <u>in all cases</u>, the manufac-

turer can rightly rely on the sensitivities of those whose chief, if not sole, concern is the economic profit which can be derived from the use of the product seems to be unduly myopic.

Apart from the question of the proper resolution of the Comment n equation, however, there remains the questions of who, under our system of jurisprudence, is supposed to provide that resolution. As noted, Comment n sets forth a multitude of factors for consideration, in essence establishing a "reasonableness" standard for the determination of the required extent of communication of warnings. That the question of "reasonableness," under all the circumstances, is peculiarly within the province of the jury has been recognized by most courts which have considered the question. In

Dougherty v. Hooker Chemical Corp., 540 F.2d 174 (3rd Cir. 1976), for example, the court concluded that resolution of the Comment n question "comes within the function of the trier of fact," at 179, and reversed a directed verdict for defendant. A similar conclusion was reached by the Supreme Court of Arizona in Shell Oil Co. v. Gutierrez, 119 Ariz. 426, 581 P.2d 271, 279 (1978).

Given the recent spate of litigation arising from the use of dangerous chemicals in the workplace, it is beyond question that the duty of a manufacturer to warn users of those chemicals of their hazards is a critical issue. While the judgments of the courts below obviously seek to resolve that issue, the question remains as to whether the resolution achieved here is consistent with the

principles and purposes of summary judgment. As this Court has recognized,

> "But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice." Kennedy v. Silas Mason Co., 334 U.S. 249, 256-57 (1948).

Summary judgment is, of course, the chief method by which a court may terminate litigation on the merits without trial. The grant of certiorari by this Court, and the reversal of the judgments of the courts below, would serve to reinforce the doctrine that summary judgment is intended only to remove from the judicial arena those cases which present no genuine dispute as to material issues, and not to permit the courts to impose new standards of "reasonable"

conduct by judicial fiat.

Respectfully submitted,

Milton Dunn, Esq.
23300 Chagrin Boulevard
Suite 106
Beachwood, Ohio 44122
(216) 464-8310

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Petition for Certiorari were sent by ordinary U.S. mail, postage pre-paid, to Robert C. Maynard, Squire, Sanders & Dempsey, Attorneys for Defendant Union Carbide Corporation, 1800 Union Commerce Building, Cleveland, Ohio 44115 this ____ day of September, 1984.

Milton Dunn

APPENDIX

Pertinent text of Federal R.Civ.P. 56:

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-3239

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BETTY ADAMS; JOSEPH ADAMS,
Plaintiffs-Appellants,

v.

UNION CARBIDE CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed July 2, 1984

Before: ENGEL and KRUPANSKY, Circuit Judges; and WEICK, Senior Circuit Judge.

KRUPANSKY, Circuit Judge, delivered the opinion of the court, in which ENGEL, Circuit Judge joined. WEICK, Senior Circuit Judge, (pp. 11-27) delivered a separate dissenting opinion.

KRUPANSKY, Circuit Judge. Plaintiff Betty Adams, a former employee of General Motors Corporation (GMC), brought this diversity action against Union Carbide Corporation in the United States District Court for the Northern District of Ohio. Plaintiff alleged that Union Carbide failed to adequately warn GMC employees of the dangerous propensities of the chemical toluene diisocyanate (TDI), which Union Carbide manufac-

tured and supplied to GMC for use in GMC's automobile assembling process. Plaintiff further contended that as a result of defendant's negligence, she developed a respiratory ailment known as "TDI asthma". Plaintiff sought $500,000 in damages. Plaintiff's husband, Joseph Adams, also sought $50,000 in compensation for the loss of his wife's services, companionship and consortium.

On March 10, 1983, the district court granted defendant's motion for summary judgment. Plaintiff's appeal to this court was predicated on the theory that material issues of fact were presented by this negligence action which should have been submitted to a jury rather than summarily resolved by the court below.

The record disclosed that plaintiff Adams was employed by the Fisher Body Division of GMC at its Elyria, Ohio plant between 1967 and 1978. TDI was first supplied to GMC for use in making automobile seat cushions in 1969. The chemical was delivered in bulk liquid shipments either by tank trucks or rail tank cars and transferred from the common carrier into GMC storage tanks. The TDI was then pumped, as needed, into a closed vessel system for automatic mixing with other chemicals. The only potential exposure GMC employees had to TDI vapors occurred when the seat cushions were removed from their open molds.

Union Carbide admitted that its officials were aware of respiratory hazards associated with exposure to TDI vapors as early as 1964. In 1969, defendant prepared a manual specifically addressing these conditions for GMC. Attached to this report were eight related articles on TDI's use in manufacturing which had been prepared by various sources. Of special relevance to the case at bar was an article entitled "Chemical Safety Data Sheet SD-73" prepared by the Manufacturing Chemists Association. The article detailed the "properties and essential information for safe handling and use of

TDI." Included in this publication was a section entitled "Employee Safety," which read in pertinent part:

> 5.1.1. Employee training is probably the most important safety measure a company can take. . . . An effective employee education should include the following items:
>
> • • •
>
> (e) He should know when personal protective equipment is to be used and how to use it effectively.
>
> 5.1.2. It is the responsibility of supervision to train each worker, and, equally as important, to instill within him an attitude of safety. The supervisor must procure the necessary safety equipment and be sure that it is maintained in working order at all times.
>
> 5.1.3. Operating procedures, including all safety rules, should be posted in work areas where they may be read by employees.

In 1975, officials from GMC and Union Carbide met to discuss the handling of TDI to minimize personnel exposure. Additional guidelines were furnished to GMC following this conference.

Plaintiff Adams worked in various departments in the Elyria plant during the course of her employment, including Department No. 5, where automobile seat cushions were removed from their molds and exposure to TDI was possible. Plaintiff's medical records indicated that she had sought medical attention as early as 1969 for symptoms related to exposure to fumes and gaseous materials. In 1974, plaintiff's doctor advised GMC that Adams not be assigned to any area where the air was contaminated with fumes because of her bronchopulmonary condition. GMC's plant physician discussed this letter with the plaintiff and suggested she continue working in De-

partment No. 5 on a trial basis. One year later, in February, 1975, plaintiff's treating physician again wrote to GMC and recommended that plaintiff be permanently reassigned from Department No. 5 due to her chronic bronchitis.

Plaintiff was permanently restricted from Department No. 5 thereafter. Her employment records disclosed that she was placed on temporary disability several times by her treating physician due to bronchitis and flu. In September, 1978 plaintiff came under the care of a different treating physician, who certified that plaintiff was permanently disabled from work due to TDI hypersensitivity from work-related exposure.

Plaintiff filed her complaint on June 20, 1980, alleging that Union Carbide was negligent in failing to warn GMC and its employees of the "harmful, toxic and deleterious effects to TDI" and that as a result of defendant's negligence, "she has been rendered totally disabled." On May 11, 1982 defendant Union Carbide filed a motion for summary judgment which it supported with two claims: (1) that the warnings given by Union Carbide to plaintiff's employer GMC satisfied its duty of reasonable care to the plaintiff, and (2) that the statute of limitations barred plaintiff's action. The district court granted defendant's motion for summary judgment based upon its finding that the case presented no unresolved material issue of fact, and that as a matter of Ohio law, defendant did not breach its duty to plaintiff. The lower court did not address the statute of limitations issue.

The grant or denial of summary judgment must be made in accordance with Fed.R.Civ.P. 56, which states in pertinent part:

> (c) Motions and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The standard to be applied in determining motions for summary judgment was enunciated by this Circuit over 20 years ago and is still in accord with the overwhelming weight of authority:

> In ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated.

Bohn Aluminum & Brass Corp. v. *Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962). *See also United States* v. *Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993 (1962); *Sankovich* v. *Life Insurance Company of North America*, 638 F.2d 136 (9th Cir. 1981).

After recognizing the above criteria for summary judgment as controlling, the trial judge in the instant case wrote:

> A thorough examination of all evidence presented here compels the conclusion that no material issue of fact exists in this conflict. The parties neither dispute that defendant warned GM, Mrs. Adams' employer, of the dangers related to TDI but did not warn Mrs. Adams directly, nor do they dispute the notations in GM's medical records referring to ailments suffered by Mrs. Adams during the course of employment. There remains only the application of these undisputed facts to the appropriate legal standards.

The lower court then proceeded to apply the facts as established to the "appropriate legal standard", which under Ohio law is found in the Restatement (Second) of Torts § 388.[1]

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[1] A court sitting in diversity is bound to apply the law of the state's highest court. *Coleman* v. *Western Electric Co.*, 671 F.2d 980, 983 (6th Cir. 1982). The district court determined that the Ohio Supreme Court has not ruled specifically on the duty of a manufacturer of

Section 388 reads:

> **§ 388. Chattel Known to be Dangerous for Intended Use**
>
> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Comment n following the restatement advises that the manufacturer's duty to warn may be discharged by providing information of the dangerous propensities of the product to a third person (GMC in the instant case) upon whom it can reasonably rely to communicate the information to the ultimate users of the product or those who will be exposed to its hazardous effects. The comment adds that "[m]odern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so."

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dangerous products to warn third parties, such as the plaintiff in this action, of its dangerous propensities. However, the lower court concluded that if the Ohio Supreme Court had spoken on the issue, it would probably follow the reasoning of *Sams* v. *Englewood Ready-Mix Corp.*, 22 Ohio App. 2d 168, 259 N.E. 2d 507 (1969), which accepted § 388 of the restatement of torts. Neither party challenges this conclusion.

Although most negligence actions are resolved by submission to a jury, "it would be a mistake to conclude summary judgment is never appropriate in a negligence action." *Croley* v. *Matson Navigation Company*, 434 F.2d 73 (5th Cir. 1970). *Croley* and other decisions provide ample authority for the use of summary judgment in cases where the alleged negligence of a manufacturer is at issue. *See e.g., Gracyalny* v. *Westinghouse Electric Corporation*, 723 F.2d 1311, 1316 (7th Cir. 1983) ("a grant of summary judgment may be affirmed on any ground that finds support in the record)"; *Bryant* v. *Technical Research Company*, 654 F.2d 1337 (9th Cir. 1981); *Aetna* v. *Loveland Gas & Electric*, 389 F.2d 648 (6th Cir. 1966); *Millhouse* v. *General Tire and Rubber*, 9 Ohio App. 3rd 203, 459 N.E.2d 623 (1983).

The evidence which was before the court below demonstrated that TDI was delivered by Union Carbide to GMC in bulk liquid form. After the delivery, GMC had exclusive control over both the chemical and the GMC employees who came into contact with it.

While § 388 defines a manufacturer's duty to warn those who may ultimately be exposed to its product, comment n to the restatement also explains that the duty can be discharged by the manufacturer's reasonable reliance on a third party — in this case GMC — to convey the information supplied by the manufacturer to the ultimate user — in this case employees such as Betty Adams. The fact that GMC repeatedly updated its information about TDI from Union Carbide, coupled with the fact that GMC itself had a duty to its employees to provide them with a safe place to work, supports the inescapable conclusion that it was reasonable for Union Carbide to rely upon GMC to convey the information about the hazardous propensities of TDI to its employees within the context of comment n of the restatement.

The dissent's rejection of the above conclusion is based upon a bootstrap-type analysis. First the dissent concludes that *GM* did not adequately warn its employees of the dangerous

propensities of TDI. (Slip op. at —). The dissent thereupon erroneously relies upon *GM*'s failure to adequately advise its employees of the hazardous propensities of TDI as proof of Union Carbide's negligence. However, the key issue in this case is not, as the dissent seems to hypothesize, whether the information supplied by Union Carbide actually reached GM's employees. Rather, the critical question is whether Union Carbide's reliance upon GM to relay the information to its employees was reasonable, when viewed in light of GM's duty to safeguard its employees' health and in consideration of the fact that comprehensive information concerning the use of TDI was conveyed by Union Carbide to GM for the express purpose of dissemination to GM's employees.

In effect, the dissent is interpreting GM's failure to relay the information to its employees as negligence attributable to Union Carbide. The negligence of GM under the circumstances disclosed by the record in this case cannot vicariously be imposed upon Union Carbide.

Based upon the foregoing factual analysis of the case, there remained no "genuine issue as to any material fact" which required jury consideration, and therefore the grant of summary judgment was proper. This court's reasoning and ultimate conclusion is reflected in *Millhouse* v. *General Tire and Rubber Co.*, 9 Ohio App. 3rd 203, 459 N.E.2d 623 (1983), wherein a company called Mobile Wash had contracted to clean defendant's tank cars, certain of which had contained the chemical TDI. An employee of Mobile Wash was overcome with fumes and died while cleaning a TDI tanker. The Administratrix of the decedent's estate commenced an action against General Tire, alleging, *inter alia*, that it was negligent in failing to warn Mobile Wash Employees of the dangerous propensities of TDI. The trial court granted summary judgment for the defendant and the state appellate court affirmed. The court held that there were no material issues of fact in the case because uncontroverted evidence disclosed that defendant had notified Mobile Wash that the tank cars had contained TDI,

and that Mobile Wash supervisors had been warned of the hazards inherent to TDI. While the *Millhouse* decision was predicated on the defendant's duty to warn employees of an independent contractor, it's resolution is directly analogous to a situation, like the case at bar, where a manufacturer's duty to warn employees of a company which uses its product is at issue.

In a case strikingly similar to the case at bar, *Younger* v. *Dow Chemical Corp.*, 202 Kan. 674, 451 P.2d 177 (1969), the Kansas Supreme Court upheld the grant of summary judgment in favor of the defendant manufacturer on the basis that adequate warnings had been given to the immediate vendee, thereby satisfying the manufacturer's duty to warn the vendee's employees of dangers related to exposure to TDI. As in the case at bar, the defendant had sold TDI to the plaintiff's employer and had warned the employer of the chemical's dangerous propensities.

Similarly, in *Reed* v. *Penwalt Corp.*, 22 Wash. App. 718, 591 P.2d 478, appeal dismissed 604 P.2d 614 (Wash. 1979), a jury verdict for defendant was upheld on appeal.[2] There the defendant supplied a food processing plant with caustic soda. This chemical was shipped in tank cars and unloaded into holding tanks owned by the food processor. It was later diluted according to a formula controlled by the processor. There was no evidence that the defendant had any control over the use of the chemical in the plant. The Washington Court of Appeals determined that the supplier's duty to warn had been fulfilled by providing adequate warning to the immediate vendee. As in the case at bar, the *Reed* court also noted that since the product was used in a different form than its original state, it was reasonable to expect that the vendee had a safety pro-

[2] Although the jury verdict on *Reed* distinguishes it from the case at bar, the point of law which *Reed* makes regarding the discharge of the manufacturer's duty to warn is directly applicable to the instant case.

gram designed to communicate adequate information about the substance to its employees.

And again, in *Jones* v. *Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1393 (1976), the Kansas Supreme Court upheld summary judgment in favor of defendant, a manufacturer of propane gas, based upon the lower court's finding that the manufacturer fulfilled its duty to the ultimate consumers when it verified that the distributor to whom it sold the product in bulk was adequately trained and informed of the hazardous characteristics of the gas, and would convey that knowledge to consumers. *See also Marker* v. *Universal Oil Products*, 350 F.2d 603 (10th Cir. 1957) (developer of a petroleum refining process had right to rely upon duty of employer who used the process to protect its own employees).

In sum, the lower court's findings of fact and application of the law is well reasoned and in line with respected precedent. The decision of the district court is hereby AFFIRMED.

WELCH, Senior Circuit Judge, dissenting: I respectfully dissent. The district court erred in granting summary judgment in favor of defendant-appellee Union Carbide Corporation and dismissing the complaint of plaintiff-appellant Betty Adams, thereby depriving her of her right to trial by jury to which she was justly entitled.

In her complaint, Mrs. Adams had alleged that defendant Union Carbide Corporation was negligent in failing and neglecting to warn her of the harmful, toxic and deleterious effects of her exposure to the poisonous fumes of toluene diisocyanate (TDI) which it manufactured and supplied to her employer, General Motors Corporation (GMC), and which had permeated the entire area of the plant where she was employed and working. As a direct and proximate result thereof, she contracted TDI hypersensitivity asthma and became totally and permanently disabled.

In my opinion, construing the evidence in its most favorable light in favor of Mrs. Adams, to which she was justly entitled under the law, there were genuine issues of material fact not properly disposed of by summary judgment. The judgment of the district court should therefore be reversed.

I

The Facts

The uncontroverted facts underlying this dispute bear repeating and clarification. Although Mrs. Adams was not certified as permanently disabled due to "TDI hypersensitivity asthma from exposure at work" until October 1, 1978, GMC was first advised as early as May, 1969, by her private doctor that she was experiencing significant eye and throat irritation and a cough because of "vapors at her work."[1] On November

[1] An affidavit submitted by Union Carbide indicates that before Union Carbide delivered any TDI to GMC's Fisher Body-Elyria plant, it fully informed plaintiff's employer of all potentially harmful, toxic and deleterious effects of TDI at a meeting on or about

10, 1971, Mrs. Adams complained to GMC's plant physician "that fumes from a tank near where she was working were causing a 'burning throat,'" and she was temporarily relieved from working in Department No. 5. Twenty days later, however, after noting that her symptoms had cleared, GMC's physician requested her to return to Department No. 5. In February, 1974, Mrs. Adams' physician treated her for bronchopulmonary problems, and advised GMC that she should not be assigned to work where the air was contaminated with these irritating fumes. Notwithstanding this recommendation, the GMC physician encouraged Mrs. Adams to remain in Department No. 5 on a "trial" basis. One year later, in February, 1975, her personal physician recommended that she be removed permanently from Department No. 5 because of chronic bronchitis, and the GMC plant physician concurred. Following, Mrs. Adams' permanent restriction from Department No. 5, she was placed on temporary disability by her personal physician for bronchitis and flu several times in 1978, prior to being certified by a different physician as permanently disabled due to "TDI hypersensitivity asthma."

The extent of plaintiff's exposure to TDI vapors is disputed. Although the majority indicates "[t]he only potential exposure GMC employees had to TDI vapors occurred when the seat cushions were removed from their open molds," Mrs. Adams stated in her deposition that due to inadequate ventilation, she was exposed to the fumes from Department No. 5 even when she was working in another department. Additionally, she stated that on at least one occasion, she was directly exposed to TDI during a chemical spill, although she did not learn of the chemical's identity until her union told her it was TDI.

February 4, 1969. Mrs. Adams began her employment in Department No. 5 in 1967, but the onset of her symptoms in May, 1969 from "fumes" and "vapors" is consistent with the delivery of TDI by defendant after the February 4 meeting. The relatively short period of time elapsing before the onset of her difficulties highlights the extremely dangerous nature of Union Carbide's product.

Furthermore, Mrs. Adams testified that GMC never told her that she was working with TDI, never provided her with written safety procedures applicable in the event of chemical spills, and never screened her health background prior to sending her into Department No. 5. Defendant Union Carbide presented no contrary evidence.

II

General Principles of Negligence Law

Since none of the parties contest the applicability of Restatement (Second) of Torts § 388 (1965) as the legal standard defining defendant's duty to plaintiff, I turn to those principles of negligence law which are embodied in § 388 to determine whether, as a matter of law, Union Carbide, the manufacturer of TDI, exercised reasonable care to inform the employees of GMC, including Mrs. Adams, of TDI's dangerous condition or of the facts which make TDI likely to be dangerous. Stated otherwise, in the context of this case, we must determine whether reasonable men could differ as to whether it was reasonable for defendant Union Carbide to totally rely on GMC to communicate the information about TDI to the ultimate users of the product, including plaintiff, who would be exposed to the product's hazardous effects.

Comment n to § 388 is concerned with warnings given to third persons, such as GMC. It states in pertinent part:

> *Giving to the third person through whom the chattel is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability.* It is merely a means by which this information is to be conveyed to those who are to use the chattel. *The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it.* All sorts of chattels may be supplied for the use of others, through all sorts of third persons and under an infinite variety of

circumstances. This being true, it is obviously impossible to state in advance any set of rules which will automatically determine in all cases whether one supplying a chattel for the use of others through a third person has satisfied his duty to those who are to use the chattel by informing the third person of the dangerous character of the chattel, or of the precautions which must be exercised in using it in order to make its use safe. There are, however, certain factors which are important in determining this question. There is necessarily some chance that information given to the third person will not be communicated by him to those who are to use the chattel. This chance varies with the circumstances existing at the time the chattel is turned over to the third person, or permission is given to him to allow others to use it. These circumstances include the known or knowable character of the third person and may also include the purpose for which the chattel is given. Modern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so. *If the chattel is one which if ignorantly used contains no great chance of causing anything more than some comparatively trivial harm, it is reasonable to permit the one who supplies the chattel through a third person to rely upon the fact that the third person is an ordinary normal man to whose discredit the supplier knows nothing, as a sufficient assurance that information given to him will be passed on to those who are to use the chattel.*

If, however, the third person is known to be careless or inconsiderate or if the purpose for which the chattel is to be used is to his advantage and knowledge of the true character of the chattel is likely to prevent its being used and so to deprive him of this advantage—as when goods so defective as to be unsalable are sold by a wholesaler to a retailer—the supplier of the chattel has reason to expect, or at least suspect, that the information will fail to reach those who are to use the chattel and whose

safety depends upon their knowledge of its true character. In such a case, the supplier may well be required to go further than to tell such a third person of the dangerous character of the article, or, if he fails to do so, to take the risk of being subjected to liability if the information is not brought home to those whom the supplier should expect to use the chattel. In many cases the burden of doing so is slight, as when the chattel is to be used in the presence or vicinity of the person supplying it, so that he could easily give a personal warning to those who are to use the chattel. Even though the supplier has no practicable opportunity to give this information directly and in person to those who are to use the chattel or share in its use, it is not unreasonable to require him to make good any harm which is caused by his using so unreliable a method of giving the information which is obviously necessary to make the chattel safe for those who use it and those in the vicinity of its use.

Here, as in every case which involves the determination of the precautions which must be taken to satisfy the requirements of reasonable care, *the magnitude of the risk involved must be compared with the burden which would be imposed by requiring them (see* § 291*), and the magnitude of the risk is determined not only by the chance that some harm may result but also the serious or trivial character of the harm which is likely to result (see* § 293*).* Since the care which must be taken always increases with the danger involved, it may be reasonable to require those who supply through others chattels which if ignorantly used involve grave risk of serious harm to those who use them and those in the vicinity of their use, to take precautions to bring the information home to the users of such chattels which it would be unreasonable to demand were the chattels of a less dangerous character.

Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it unless

> he knows that the other is careless, *it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing.* It may well be that he should take the risk that this information may not be communicated, *unless he exercises reasonable care to ascertain the character of the third person,* or unless from previous experience with him or from the excellence of his reputation the supplier has positive reason to believe that he is careful. *In addition to this, if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful.* Many such articles can be made to carry their own message to the understanding of those who are likely to use them by the form in which they are put out, by the container in which they are supplied, or by a label or other device, indicating with a substantial sufficiency their dangerous character. Where the danger involved in the ignorant use of their true quality is great and such means of disclosure are practicable and not unduly burdensome, it may well be that the supplier should be required to adopt them. (Emphasis added).

The majority's quote from Comment n that "[m]odern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so," *supra* at 6, barely scratches the surface of considerations which must be weighed and balanced in determining whether Union Carbide discharged its duty to exercise reasonable care to inform Mrs. Adams of the dangerous nature of TDI. Whether it is reasonable to rely on the third party to inform the ultimate user about the product's hazardous properties requires a balancing of such factors as the dangerous nature of the product, the burdens imposed by requiring warnings to the ultimate users, the like-

lihood that the particular warning will be adequately communicated to those who will foreseeably use the product, the intensity and form of the warnings given, and the form in which the product is used. *See Dougherty* v. *Hooker Chemical Corp.*, 540 F.2d 174, 179 (3d Cir. 1976).

The majority opinion holds:

> The fact that GMC repeatedly updated its information about TDI from Union Carbide, coupled with the fact that GMC had a duty to its employees to provide them with a safe place to work, supports the inescapable conclusion that it was reasonable for Union Carbide to rely on GMC to convey the information about the hazardous propensities of TDI to its employees within the context of comment n of the restatement.

Supra at 7. Not only do I disagree both with the inescapability of such conclusion and with its underlying premises, but I conclude, to the contrary, that there is no evidence to support the reasonableness of Union Carbide's actions, and therefore, that there are genuine issues of material fact not appropriate for resolution by summary judgment.

There is no evidence that "GMC repeatedly updated its information about TDI from Union Carbide." Based on an extensive review of the entire record before the District Court, it is clear that GMC, at best, discussed the dangers of TDI with defendant only twice – once in 1969 prior to delivery of TDI by defendant, and again in 1975, some six and one-half years after GMC first began TDI use. What the majority has characterized as "repeatedly" really constitutes only isolated communications between GMC and Union Carbide. In plaintiff's case, the communications were infrequent enough for her to become substantially disabled through repeated exposure to a poisonous product as extremely dangerous as TDI.

The assertion that Union Carbide could rely on GMC because "GMC itself had a duty to its employees to provide them with a safe place to work" is questionable. Accepting the fact

that such duty exists, I find not an iota of evidence in the record before the district court or this Court that Union Carbide relied on GMC's discharge of this duty as the reason for failing to notify Mrs. Adams and the other ultimate users about the dangers of TDI. Furthermore, even if defendant did so rely, there is no evidence of any actions taken by Union Carbide either before or after the February 4, 1969 meeting to determine how successfully GMC was discharging its duty to provide a safe work place, such that Union Carbide's reliance on GMC to disseminate warnings about TDI could be termed "reasonable." What the record does support are findings that GMC never communicated the dangers of TDI to Mrs. Adams, never informed her of emergency procedures in the event of a TDI spill, and never screened her for TDI sensitivity while she was employed in Department No. 5, even after her illnesses due to exposure to poisonous "fumes" in that department. In light of these facts, a conclusion that defendant's reliance on GMC was reasonable as a matter of law is insupportable.[2]

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[2] Similarly, the district court's opinion stated:

> No inference can be drawn that defendant breached its duty by relying on GM to inform its own employees of these warnings under its safety programs. In fact, there is evidence that GM sought and was given *continuing information* in regard to employee safety which would foster reasonable reliance by defendant. (Emphasis added).

and

> *There is no evidence suggesting that GM did not have a safety program* to inform employees of its warnings upon which defendant could reasonably rely. To the contrary, the affidavits submitted by defendant substantiate the occurrence of meetings between its experts and GM medical staff and industrial hygenists [sic]. (Emphasis added).

For purposes of summary judgment, GMC's failure to warn should be construed against defendant as the moving party, at least to the extent such negative inference speaks to the unreasonableness of defendant's total reliance on GMC. Furthermore, the district court's conclusions regarding the quality of GMC's efforts to seek "continuing information" and to implement a "safety program" are directly refuted by the record, and should be found by this Court to be clearly erroneous.

Comment n addresses the majority's implicit assumption that GMC will behave as "an ordinary normal man" in the discharge of its duty to its employees to provide a safe place to work as follows:

> If the chattel is one *which if ignorantly used contains no great chance of causing anything more than some comparatively trivial harm*, it is reasonable to permit the one who supplies the chattel through a third person to rely upon the fact that the third person is an ordinary normal man to whose discredit the supplier knows nothing, as a sufficient assurance that information given to him will be passed on to those who are to use the chattel. (Emphasis added).

There is no dispute that TDI is an extremely dangerous, poisonous product. Defendant Union Carbide admitted that its officials were aware of respiratory hazards associated with exposure to TDI vapors as early as 1964. The magnitude of substantial harm resulting from improper use of the product is further evidenced by Mrs. Adams' statement in her deposition that "38 employees [at the Elyria plant] have been damaged by TDI." (Appendix 138). Perhaps this widespread injury was the reason GMC saw fit in 1975 to recontact Union Carbide with the express purpose of discussing safeguards for its employees working with TDI.

The risk to Mrs. Adams and other users of TDI could never be considered "some comparatively trivial harm." Thus, it is error for this Court to conclude under Comment n that defendant could rely, as a mater of law, on GMC's duty to its employees to provide them with a safe place to work, particularly since defendant could easily have ascertained that GMC gave no warnings of any kind to its employees, including Mrs. Adams, and did not provide them with a safe place to work, and additionally that poisonous fumes were permeating through the entire work area and a number of its employees including Mrs. Adams were being affected.

III

The Controlling Case Law

The district court noted:

> When the highest court has not ruled on an area of law, the federal court must ascertain the state law from all available sources. When a state appellate court announces and relies on a principle, a federal court should recognize that reliance as indicative of state law unless it is convinced that the highest court would decide differently. *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 61 St. [sic] Ct. 179, 85 L. Ed. 139 (1940); *Ruth* v. *Bitumerous* [sic] *Casualty Corp.*, 427 F.2d 290 (6th Cir. 1970).

I cannot agree with the majority's conclusion that Ohio would hold, as a matter of law, that defendant Union Carbide exercised reasonable care and was discharged from liability thereby, because it provided warnings to GMC, particularly when the warnings were not adequately communicated to the ultimate users.

In my opinion, the clearest statement of Ohio law applicable to this case is found in *Hargis* v. *Doe*, 3 Ohio App. 3d 36 (1981). In *Hargis*, the plaintiff was injured when his clothing caught fire after becoming dampened with a degreasing solvent supplied by the defendant. At the time of the accident, Hargis was not using the solvent for its intended cleaning purpose, but instead to detect faulty welds in automatic torque converters by immersion in a vat of the solvent.

In *Hargis*, the Ohio Court of Appeals held that a supplier is subject to liability for damages proximately caused by any reasonable use of the product for any purpose, "if he fails to exercise reasonable care to give the user information which [the supplier] has and which [the supplier] should realize would be necessary to make use of the product safe. See Restatement of Torts 2d, Section 388." 3 Ohio App. 3d at 37. In

fact, the court in *Hargis* specifically held that the supplier did have a duty to warn the user, Hargis, of the flammable nature of the product and to proscribe its use around fire. *Id.* Because Ohio recognizes the existence of this duty to warn, the failure of the supplier to warn the user is sufficient to overcome a verdict for defendant supplier as a matter of law on the specific issue of negligence. *Id.* This Court is incorrect in holding otherwise on the issue of negligence.

According to *Hargis*, however, a finding of negligence is not dispositive of plaintiff's right to recover damages. The appropriate standard of law defined by the Ohio Court of Appeals is set out in Headnote 2:

> Where a particular product *is not inherently dangerous*, and *where the supplier has no access to an employee*, some causal relationship between the failure to warn and the injuries must be shown in order to overcome a motion for directed verdict. (Emphasis added).

Id. at 36. In so holding, the Ohio Court of Appeals has also spoken to plaintiff Adams' action by stating that

> [a]lthough the inherent dangers of certain types of products, such as poisons, explosives, drugs, and the like, *may require personal notice to the user without reference to any intervening source*, in other situations [involving products not unreasonably dangerous in their foreseeable uses], the requirement of an adequate warning extends only to those to whom the distributor has reasonable access. (Emphasis added).

Id. at 38. Thus, under *Hargis*, defendant Union Carbide, the producer and supplier of a concededly extremely dangerous and poisonous product, owed plaintiff a duty to warn of TDI's dangers, regardless of any warnings supplied to GMC, and plaintiff may even be entitled to judgment, as a matter of Ohio law, for her damages suffered as a result of defendant's failure

to notify her personally of the dangerous properties of its product.

The majority's reliance on *Millhouse, supra* at 8, is misplaced. First of all, the decision in *Millhouse* was based on the law of agency, and not products liability. The deceased was not a user of the product, but instead the employee of an independent contractor hired by defendant General Tire to clean one of defendant's tank cars containing TDI. In Ohio, there is a rule of general acceptance that where an independent contractor undertakes potentially dangerous work for another and one of the independent contractor's employees is injured, no liability ordinarily attaches to the party who engaged the independent contractor. *Millhouse*, 9 Ohio App. 3d at 204. By contrast, *Hargis, supra*, makes it clear that there is no analogous rule for products liability cases involving § 388.

Millhouse is also distinguishable on its facts: it was uncontested in the case that the employer had established safety procedures for working around TDI, and that the deceased plaintiff in fact had been warned of the properties of TDI. *Id.* Furthermore, the tank car which the deceased was cleaning had the letters "TDI" stenciled on, and had a poison placard on each side and end. *Id.* at 203. None of these or similar facts have been established in Mrs. Adams' case.[3]

The decisions of the courts of Kansas and Washington are also distinguishable. In *Younger*, the Kansas Supreme Court specifically noted that the case *did not* involve a highly dan-

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[3] If *Millhouse* may be relied on at all, it is for the proposition that TDI is extremely dangerous and even fatal if not used under proper conditions. The procedures established by Millhouse's employer required the employee to wear a full wet suit, including a jacket, pants, rubber gloves and boots, a mask, a breathing motor which supplies air through a hose, wristlets and a safety line. 9 Ohio App. 3d at 204. Millhouse's failure to wear a mask and independent breathing source resulted in his unfortunate demise.

In this case, as was already noted, Mrs. Adams stated that GMC had no safety procedures regarding TDI, and even failed to provide adequate ventilation in the workplace. Perhaps if plaintiff and other GMC employees had been informed of the TDI use, they could have ensured the adoption of proper procedures by GMC.

gerous explosive or poisonous product. 451 P.2d at 184. In *Jones*, the ultimate users were unknown, there was no adequate means to express any warnings to the users, and the supplier had verified that the third party was capable of conveying the necessary information to the consumers. 549 P.2d at 1384, 1394. The decision in *Reed* was based on the doctrine of intervening negligence of the third party employer as the superceding cause of the damage, 591 P.2d at 481-82; this doctrine was limited in the case of extremely dangerous products by *Hargis*, *supra*, and furthermore requires a finding of duty to notify the ultimate user, which this Court incorrectly has found not to exist in this case, contrary to *Hargis*.[4]

Additionally, the majority has disregarded respected precedent of the highest courts of North Dakota and Arizona, both of which have adopted a much more expansive view of Comment n than the courts of Kansas and Washington. *See Seibel* v. *Symons Corp.*, 221 N.W.2d 50, 57 (N.D. 1974); *Shell Oil Co.* v. *Gutierrez*, 119 Ariz. 426, 581 P.2d 271, 278-79 (1978). The decision of the Ohio Court of Appeals in *Hargis* is consistent with these cases, and we have no reason to believe the Ohio Supreme Court would hold otherwise. *See also* Hasten, *Comparative Liability Principles: Should They Now Apply to Strict Products Liability Actions in Ohio*, 14 U. Tol. L. Rev. 1151, 1181 n.88 (1983). Thus, we are bound to apply that law to the present suit founded upon diversity. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

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[4] *Marker* v. *Universal Oil Products* is also distinguishable since it involved the duty to warn when there was a gross misuse of the product supplied to the third party. 250 F.2d at 606-07. In this case, by contrast, the TDI was used as envisioned by defendant and GMC, so that unanticipated misuse did not create the danger.

IV

The District Court Improperly Granted Summary Judgment

Determining whether the supplier's duty has been reasonably discharged under Section 388 comes within the function of the trier of fact. *See Dougherty, supra*, 540 F.2d at 179. Thus, the issue in this case was not proper for resolution by summary judgment. *Accord Bryant* v. *Technical Research Co.*, 654 F.2d 1337, 1345-46 (9th Cir. 1981); *Hopkins* v. *Chip-In-Saw, Inc.*, 630 F.2d 616, 620 n.5 (8th Cir. 1980); *Weekes* v. *Michigan Chrome & Chemical Co.*, 352 F.2d 603, 607 (6th Cir. 1965) (supplier must reasonably assure itself that third party likely to transmit information to ultimate users); *Hargis, supra*, (existence of duty sufficient to prevent directed verdict on issue of negligence alone); *Sams* v. *Englewood Ready-Mix Corp.*, 22 Ohio App. 2d 168 (1969) (liability under Section 388 should be submitted to the trier of fact). *See also Gordon* v. *Niagara Machine & Tool Works*, 574 F.2d 1182, 1189 (5th Cir. 1978) (supplier must have reasonable basis for believing third party could be expected to communicate warnings to users) (subsequent information gained by third party not relevant to negligence of supplier at time of original sale).

In its motion for summary judgment, defendant Union Carbide submitted that it was entitled to judgment as a matter of law based upon the following relevant, undisputed facts established by the record:

> (1) Carbide fully warned GM on or about February 4, 1969 concerning the harmful, toxic and deleterious effects of TDI, including the risk of TDI asthma;
>
> (2) Carbide provided the above warnings to GM before it supplied Fisher Body-Elyria with production quantities of TDI;
>
> (3) Betty Adams was exposed to TDI vapor in Department 5 at Fisher Body-Elyria;

(4) As a result of said exposure, Betty Adams developed a hypersensitivity reaction to TDI and a disease known as TDI asthma.

Although Union Carbide argues that it exercised reasonable care in this case, it is apparent, based on my review of the record, a jury could reasonably find that:

(1) no warnings were communicated by Union Carbide or by GMC to GMC's employees, including plaintiff;

(2) because of the extremely dangerous propensities of TDI, Union Carbide was obliged to take reasonable steps beyond what appears in the record to warn GMC's employees (see § 388, Comment n, *supra*), including:

(a) following up on its initial discussions with GMC in February, 1969,

(b) verifying that GMC was implementing a safety program for TDI use by its employees,

(c) inspecting the conditions in GMC's plant,

(d) overseeing the actual implementation of the safety program by GMC, or

(e) actually undertaking to warn GMC's employees directly; and

(3) there was no reasonable basis for Union Carbide to rely on GMC to communicate necessary information to employees including plaintiff.

See Gracyalny, 723 F.2d at 1321-22; *Dougherty*, 540 F.2d at 181-82.[5]

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[5] None of the opinions cited by the majority provide adequate authority for the grant of summary judgment in this case. In *Croley*, *Bryant*, and *Gracyalny*, *supra*, the Circuit Courts reversed the grant of summary judgment for reasons very similar to those I have suggested here. In *Aetna Insurance*, 369 F.2d at 653, it is stated clearly for a unanimous court that it is not preferable to

The majority has cited evidence that TDI was delivered by Union Carbide to GMC in bulk form, and that after delivery, GMC had exclusive control over both the chemical and the GMC employees who came into contact with it, *supra* at 7. Comment n notes that the form in which the product is used is only one factor considered in determining whether defendant exercised reasonable care. Although GMC's exclusive control over both the TDI and its employees may speak to the burdens that would have been imposed by requiring actual warnings to Mrs. Adams from Union Carbide, there is no substantive evidence in the record regarding the actual magnitude of that burden. On appeal, Union Carbide argues that the bulk form in which TDI is supplied to GMC virtually precludes a warning by Union Carbide to employees who subsequently may come in contact with TDI, and that the record demonstrates defendant had no effective means of communicating a warning except through GMC. Plaintiff argues that the burden of notification is not onerous, and could even have been accomplished by providing medical information on TDI to Mrs. Adams' union. Whomever is right, and I find no evidence in the record to support the arguments of either party, I am led inescapably to the conclusion that the issue of burden on defendant is one more genuine issue of material fact not properly resolved on summary judgment, as is, additionally, the impact

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dispose of negligence cases by summary judgment unless, for example, the trial court would have been required to direct a verdict for the defendant if the case had gone to trial by jury. In *Hargis*, *supra*, the Ohio Court of Appeals made it clear that the issue of the supplier's negligence is sufficient to prevent a directed verdict for the defendant, although the issue of proximate cause may require summary judgment when the particular product is not inherently dangerous and the supplier does not have reasonable access to the ultimate user. Finally, in *Millhouse*, the Ohio Court of Appeals affirmed the grant of summary judgment because the evidence adduced by defendants established the facts necessary to find for defendants as a matter of law, and because defendants' evidence was uncontested and uncontradicted by the plaintiff. In this case, Mrs. Adams has submitted substantial evidence by way of deposition and otherwise to contradict Union Carbide's assertion that it behaved reasonably.

of that burden on Union Carbide's right to reasonably rely on GMC.

Finally, Mrs. Adams argues that the warnings given by defendant to GMC were informationally inadequate to sufficiently apprise GMC of the dangers of TDI, and that this allegation is supported by GMC's subsequent communication with Union Carbide in 1975 for further discussions on the safeguards required with TDI usage. I reiterate that form and intensity of the warnings given is another factor which must be argued and balanced in determining whether defendant exercised reasonable care under the circumstances in this case. *Dougherty, supra.*

This is an important case involving interstate commerce, and a conflict among the circuits is occasioned by this Court's decision. I would reverse the district court's grant of summary judgment and remand the case for further proceedings, including the submission of questions of fact to the jury.

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Case No. 84-503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BETTY ADAMS, *et al.*,

Petitioner,

vs.

UNION CARBIDE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT UNION CARBIDE CORPORATION

ROBERT C. MAYNARD
Counsel of Record
SQUIRE, SANDERS & DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500

MARLENE F. GIBBONS
SQUIRL, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court review a grant of summary judgment by a federal court in a diversity action dismissing a state law claim against a chemical manufacturer for an alleged failure to warn, when both the federal district court and the federal circuit court of appeals, applying the correct standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, determined that there was no genuine issue of material fact with regard to the reasonableness of the manufacturer's conduct and concluded that the manufacturer was not negligent as a matter of law.

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OTHER AUTHORITIES:

Restatement (Second) of Torts, §388 (1965) 4, 5, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BETTY ADAMS, *et al.*,

Petitioner,

vs.

UNION CARBIDE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT UNION CARBIDE CORPORATION

COUNTER-STATEMENT OF THE CASE

Respondent, Union Carbide Corporation ("Union Carbide")[1] is the manufacturer of a liquid chemical known as toluene diisocyanate ("TDI"), which is used in the manufacture of urethane foams. Union Carbide sells TDI to the General Motors Corporation ("GMC") for use at its Elyria, Ohio, Fisher Body Plant. GMC uses TDI in making automobile polyurethane seat cushions. Petitioner, Betty Adams, was employed at GMC's Elyria plant

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[1] In accordance with Rule 28.1 of the Supreme Court Rules, Respondent states that the United States subsidiaries, excluding wholly owned subsidiaries, and affiliates of Union Carbide are: ACM Services, Inc., Arizona Welding Equipment Co., Miami Welding Supply, Inc., United States Welding, Inc., V. B. Anderson Co. and VBA Cryogenics Corp. (Foreign subsidiaries (except wholly-owned) and affiliates ar listed at the end of this Brief.)

during the period 1967 through 1978, when she retired due to disability. Petitioner claims that she was permanently disabled from work due to TDI hypersensitivity asthma caused by overexposure to TDI vapors at GMC's Elyria plant. TDI vapor is a respiratory irritant.

In 1980, Petitioner brought an action against Union Carbide in the Federal District Court for the Northern District of Ohio based upon a state law claim of negligence.[2] Jurisdiction was founded on diversity of citizenship. Petitioner alleged that Union Carbide had a duty to warn her directly of the potential dangers of overexposure to TDI, even though Union Carbide had warned GMC regarding the potential dangers of TDI and had provided comprehensive information to GMC regarding the safety of GMC personnel in the storage, handling and use of TDI.

Union Carbide's defense to Petitioner's claim was: (1) Union Carbide's duty to warn of the potential hazards of TDI under state law extended only to GMC and not to the employees of GMC, and (2) the information provided by Union Carbide to GMC was adequate to warn GMC concerning the potential dangers of TDI.

Summary judgment was granted to Union Carbide on the basis of its defenses. The Sixth Circuit affirmed the district court's grant of summary judgment. Both courts below held that as a matter of Ohio law, Union Carbide had satisfied its duty to warn of the potential dangers of TDI by informing GMC of the potential dangers of TDI and the methods for its safe handling and use. GMC had exclusive control over both TDI and the GMC

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[2] The action was brought by Betty Adams and her spouse, Joseph Adams. The claim by Joseph Adams was based on a loss of consortium caused by the alleged negligence of Union Carbide.

employees who came into contact with TDI. The courts below further held that the information supplied to GMC by Union Carbide about TDI was sufficient as a matter of law to warn GMC of the potential dangers of TDI.

We submit that this is not a case for this Court to grant certiorari. The only issue raised by the Petitioner is the appropriateness of summary judgment under the circumstances of this case based upon the negligence law of the State of Ohio. The applicable law relating to the duty of Union Carbide to warn of the potential dangers of TDI is entirely a matter of state law. Although the legal standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure involves federal law the appropriate legal standard for summary judgment is not at issue. Both the district court and the Sixth Circuit recognized and applied the legal standard for summary judgment as enunciated by this Court. Accordingly, there is no conflict between the decisions of the courts below and this Court. Petitioner claims only that summary judgment was not appropriate under the facts of this case. Two federal courts already have held that summary judgment was appropriate after a thorough review of the record.

REASONS FOR DENYING THE WRIT

A. The Legal Standard Applicable To Union Carbide's Duty To Warn A Third Party of Potential Dangers of Its Product Is Determined By State Law and Involves No Federal Question.

The jurisdiction of the federal courts below was founded solely on diversity of citizenship. (Petition at 1-2) In a diversity action, it has long been established by

this Court that a federal court is to apply state law to a negligence claim such as here, involving the duty of a manufacturer to warn third parties of the potential dangers of its product.[3]

Although the highest court in Ohio has not addressed the specific issue involved in this case, a decision by a state intermediate appellate court, which the district court relied on, indicates that Ohio courts would have applied the standard set forth in Section 388 of the Restatement (Second) of Torts (1965) to determine Union Carbide's liability.[4] *See Sams v. Englewood Ready-Mix Corp.*, 22 Ohio App.2d 168, 259 N.E.2d 507 (1969). Petitioner does not dispute that § 388 of the Restatement is applicable.[5] Under that standard, specifically comment

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[3] *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Coleman v. Western Electric Co. Inc.*, 671 F.2d 980 (6th Cir. 1982)

[4] If the highest court in the State has not ruled on the issue, the federal court is bound to apply the law announced by a state intermediate appellate court unless it is convinced that the highest state court would decide differently. *See West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940).

[5] The text of § 388 of Restatement (Second) of Torts, states:

> § 388. Chattel Known to be Dangerous for Intended Use
>
> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(Footnote Continued on next page)

n to § 388, a manufacturer is not required to warn directly an ultimate end user of the dangers of its product when the manufacturer has provided its vendee all the information necessary to the safe use of its product, provided that this method of disclosure gives a reasonable assurance that the information will reach those whose safety depends upon their having it.

The district court held that when Union Carbide warned GMC, an industrial user, of the potential dangers of TDI it was reasonable for Union Carbide under § 388 to rely on GMC to inform GMC's employees of the potential dangers and to implement the appropriate safety measures. An Ohio appellate case decided subsequent to the district court's opinion, which the Sixth Circuit duly noted in its opinion, reaffirms the correctness of the district court's holding. The Ohio case, *Millhouse v. General Tire and Rubber Co.*, 9 Ohio App.3d 203, 459 N.E 2d 623 (1983), involved the same product, TDI, which is involved here. The defendants in *Millhouse* were General Tire and Rubber Co. and an independent contractor, Mobile Wash, whom General Tire had hired to clean a tank car which had contained TDI. The plaintiff was the administratrix of the estate of a former employee of Mobile Wash who had died from overexposure to TDI while he was cleaning the tank car. The Ohio trial court granted summary judgment to General Tire, which was affirmed on appeal, because General Tire had satisfied

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(Footnote 5 Continued)

b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

its duty to warn of the potential danger of TDI when it warned Mobile Wash.[6]

Even if the propriety of the negligence law of Ohio as it relates to the duty of a manufacturer to warn third parties regarding the potential danger of its product was at issue, it is not an appropriate subject for this Court's review on certiorari. It involves no issue of federal law.

B. The Decisions Below are In Accordance With The Law of This Court and Other Circuits With Regard to the Standard For Summary Judgment Under Rule 56 of the Federal Rules of Civil Procedure.

There is no inconsistency in the standard for summary judgment under Rule 56 of the Rules of Civil Procedure which was applied by the district court and the Sixth Circuit and the standard enunciated by this Court. The Sixth Circuit stated in its opinion:

> The standard to be applied in determining motions for summary judgment was enunciated by this Circuit over 20 years ago and is still in accord with the overwhelming weight of authority:
>
> "In ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized whereas the opponent's are indulgently treated."

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[6] Other jurisdictions have held to the same effect. *See, e.g., Reed v. Pennwalt Corp.*, 22 Wash. App. 718, 591 P.2d 478, *appeal dismissed*, 93 Wash.2d 5, 604 P.2d 164 (1979); *Younger v. Dow Corning Corp.*, 202 Kan. 674, 451 P.2d 177 (1969); *see also, Marker v. Universal Oil Products Co.*, 250 F.2d 603 (10th Cir. 1957) (applying the law of Oklahoma).

The Sixth Circuit adopted the holdings of its earlier decision in *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962) and this Court's decision in *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). The district court recognized that Union Carbide had the burden of showing the absence of any genuine issue of fact and that all reasonable inferences which might be drawn from the evidence must be viewed in the manner most favorable to the non-moving party, in accord with this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

As in any negligence case, the reasonableness of defendant Union Carbide's conduct was an issue. Under Ohio state law Union Carbide had no duty to warn Petitioner directly of the potential dangers of TDI if (1) the information provided to GMC by Union Carbide was sufficient to warn GMC of the potential dangers of TDI and (2) Union Carbide was reasonable in relying on GMC to warn GMC employees regarding the potential dangers of TDI. The district court recognized that generally a determination whether a warning was adequate under the particular facts of a case is a jury question. The district court, however, also correctly recognized that when the legal standard for summary judgment is met, summary judgment must be granted even in a negligence case. This view is consistent with the decisions of this Court and the law of the other Circuits.[7] Petitioner has cited

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[7] Contrary to Petitioner's suggestion, the Sixth Circuit's decision in this case is consistent with its earlier decision in *Aetna Ins. Co. v. Cooper Wells & Co.*, 234 F.2d 342 (6th Cir. 1956) and the view of the other Circuits in *Bryant v. Technical Research Co.*, 654 F.2d 1337 (9th Cir. 1981) and *Croley v. Matson Navigation Co.*, 434 F.2d 73 (5th Cir. 1970). In fact, the Sixth Circuit in

(Footnote Continued on next page)

no case where summary judgment was prohibited per se, regardless of the circumstances of the case, solely because the claim was predicated on a certain legal theory, which is the position Petitioner is advocating before this Court. Summary judgment under Rule 56 is a procedural mechanism applicable to any and all actions, provided the requisites of the rule have been met.[8]

(Footnote 7 Continued)
this case cited as support for its decision, *Aetna*, *Bryant* and *Croley*. These cases stand only for the proposition that summary judgment is appropriate less frequently in negligence cases than with regard to other types of claims. For example, in *Bryant*, the Ninth Circuit determined that under the facts of that case summary judgment was not appropriate because the non-moving party had introduced sworn statements which created a dispute whether the manufacturer had provided an adequate warning to its vendee regarding the dangerous propensities of its product. The Ninth Circuit expressly stated, however, that "we do not foreclose the possibility that under some circumstances the adequacy of warnings may be decided by summary judgment. . . ." *Id.* at 1346. Both the district court and the Sixth Circuit recognized that principle as a correct statement of the law.

[8] The Notes of the Advisory Committee on Rules state in reference to Rule 56: "This rule is applicable to all actions, ..." *Dougherty v. Hooker Chemical Corp.*, 540 F.2d 174 (3rd Cir. 1976), cited by Petitioner, does not stand for a contrary proposition in the context of determinations under § 388 of the Restatement. The Third Circuit in *Dougherty* held only that a directed verdict in favor of the manufacturer was not proper in that case because it was apparent from review of all the evidence that a jury could reasonably find that the manufacturer's warning to its vendee was not adequate.

Moreover, while this Court in *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962) held "that summary procedures should be used sparingly in complex antitrust litiga-

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After an exhaustive review of the record, both the district court and the Sixth Circuit concluded that Petitioner had introduced no evidence to support her assertion under Ohio law of negligent breach of duty to warn on the part of Union Carbide.

The undisputed facts show that GMC had exclusive control over both the TDI chemical and the GMC employees who came into contact with it. GMC employees did not manipulate open containers of TDI or transfer TDI from one container to another. Union Carbide delivered TDI to GMC in bulk shipments by tank trucks or rail car lots. Upon delivery, the TDI was pumped from the common carrier into a GMC storage tank. From the storage tank TDI was pumped by GMC into a closed vessel system to mixers where TDI was automatically combined by GMC with other chemicals to cause a chemical reaction known as "polymerization." This process completely altered the chemical properties of TDI by reacting TDI with several other chemicals to form polyurethane foam. The chemical mixture was then injected into molds the shape of cushions. The record below shows that petitioner's only alleged exposure to TDI vapors was when the cushions were removed from the molds.

TDI vapor was known to be a respiratory irritant.[9]

(Footnote 8 Continued)
tion where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot" it did not state that summary judgment is never appropriate in antitrust cases.

[9] Standards for the maximum level of exposure to TDI vapor (.02 parts per million (ppm) of ambient air) were established by the Federal Occupational Safety and Health Administration. These standards were applicable to GMC's Fisher Body Division throughout the entire period of Petitioner's employment there.

Before shipping production quantities of TDI to GMC in 1969, Union Carbide supplied GMC comprehensive information regarding the potential dangers of TDI and the methods for its safe handling and use. The documentary information was thorough, explicit and based upon the information Union Carbide had at the time. Representatives of Union Carbide, including the Associate Corporate Medical Director, met with certain GMC personnel, including the Medical Director and Industrial Hygenist from GMC's Fisher Body Division, to discuss how GMC employees could be protected by GMC from the potential dangers of TDI. Union Carbide recommended in its literature preplacement physician examinations for those persons who could be exposed to TDI vapors at GMC and periodic health examinations thereafter. The documentary information supplied to GMC identified the specific respiratory problems allegedly suffered by Petitioner as one of the potential dangers of repeated exposure to TDI vapors by some individuals.

Both the district court and the Sixth Circuit concluded that there was no evidence before the trial court to even suggest that the warnings to GMC were not adequate or that Union Carbide would have a reason not to rely on GMC to inform GMC employees of the potential dangers of overexposure to TDI. The Sixth Circuit correctly rejected the bootstrap-type analysis which Petitioner is advancing before this Court that the alleged negligence of GMC in failing to adequately warn Petitioner, GMC's employee, of the potential danger of TDI constituted factual evidence of negligence by Union Carbide. As stated by the Sixth Court, the alleged negligence of GMC "cannot vicariously be imposed upon Union Carbide."

The proper legal standard for summary judgment under Fed.R.Civ.P. 56 was applied by the district court

and affirmed by the Sixth Circuit. There is no conflict between the decisions of the courts below and those of this Court or any other Circuit. The appropriateness of summary judgment under the facts of this case is underscored by the Ohio court decision in *Millhouse v. General Tire and Rubber Co., supra.*[10]

CONCLUSION

The only question Petitioner raises in her Petition turns on the particular facts of this case and, accordingly, is of interest only to the parties to it. Petitioner asks this Court to make a third review of the undisputed facts of the rather lengthy record in this case to determine whether there are any material facts in genuine dispute. This task is without any legal significance outside the limits of this case. Certiorari should be denied.

Respectfully submitted,

ROBERT C. MAYNARD
Counsel of Record
SQUIRE, SANDERS & DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500

MARLENE F. GIBBONS
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for Respondent

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[10] Rule 56 of the Ohio Rules of Civil Procedure for summary judgment is based upon Rule 56 of the Federal Rules of Civil Procedure. *See Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 309 N.E.2d 924, 925 (1974).

(Continuation of footnote 1)

The following are Union Carbide's foreign subsidiaries (except wholly-owned subsidiaries) and affiliates: Union Carbide Egypt S.A.E.; Union Carbide Ghana Limited; Union Carbide Kenya Limited; Union Carbide Nigeria Limited; Union Carbide Sudan Limited; Union Carbide Canada Limited; Chemos Industries Pty. Limited (Australia); Union Carbide Australia Limited; Union Carbide India Limited; P.T. Agrocarb Indonesia; Nippon Unicar Company Limited (Japan); Union Showa K.K. (Japan); Sony Eveready, Inc. (Japan); Union Gas Company Limited (Korea); Union Carbide Malaysia Sdn. Bhd.; Union Polymers Sdn. Bhd. (Malaysia); Union Carbide New Zealand Limited; Union Carbide Ceylon Limited (Republic of Sri Lanka); Indugas N.V. (Belgium); Calida Gas N.V. (Belgium); La Littorale S.A. (France); Argon, S.A. (Spain); Unifas Kemi A.B. (Sweden); Electro Manganes Ltda (Brazil); S.A. White Martins (Brazil); S.A. White Martins Nordeste (Brazil); Union Carbide Mexicana, S.A. de C.V. (Mexico); Electrode Maatskappy Van Suid Afrika (Eiendoms) Beperk (Republic of South Africa); Tubatse Ferrochrome (Proprietary) Limited (Republic of South Africa).